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HEARINGS

Before The

COMMITTEE ON PUBLIC WORKS

# UNITED STATES SENATE

Executive Session

TO HEAR THE WITNESSES AND COUNSEL FOR THE SENATE,  
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EXECUTIVE SESSION

A BILL TO AMEND THE CLEAN AIR ACT, AS AMENDED,  
AND FOR OTHER PURPOSES

WEDNESDAY, JULY 29, 1970

United States Senate,  
Subcommittee on Air and  
Water Pollution of the  
Committee on Public Works,  
Washington, D. C.

The subcommittee met at 1:45 p.m., pursuant to recess,  
in room 4200, New Senate Office Building, Senator Edmund S.  
Muskie (chairman of the subcommittee) presiding.

Present: Senators Muskie, Randolph, Cooper, Boggs,  
and Spong.

Staff Members Present: Richard B. Royce, Chief Clerk  
and Staff Director; Bailey Guard, Assistant Chief Clerk,  
Minority; M. Barry Meyer, Counsel; Thomas C. Jorling, Minority  
Counsel; Leon G. Billings, Professional Staff member;  
Richard D. Grundy, Professional Staff Member; Philip Cummings,  
Professional Staff Member, Allen Jones, Professional Staff  
Member, and Harold Brayman, Minority Staff Member.

Senator Muskie. A quorum is present.

1 We are starting with Federal Enforcement, page 21. I went  
2 over everything on today's agenda last night and this morning,  
3 and then I went over it with Leon, so it might be helpful if  
4 I touch upon the points that I raised with him, and this might  
5 focus your attention on it.

6 What this section does generally, Federal Enforcement, is  
7 simply to provide for the procedure to enforce the implementa-  
8 tion plans, the emission requirements, and the standards of  
9 performance that have been established under the Act.

10 With respect to 114(a)(2), it provides that the Federal  
11 Government shall move in, to enforce, if the State has not  
12 satisfactorily executed its own plan of implementation, or if  
13 the State hasn't yet got an adequate enforcement program, or --  
14 115 is the new source emission.

15 Mr. Billings. 112 is new source, 113 is hazards.

16 Senator Muskie. Hazardous substances, right. Where is  
17 new sources? 112? Do we have 112 in here?

18 Mr. Billings. 113 has its own enforcement provision.

19 Senator Muskie. This should not be 113. All right.

20 So these are the three areas in which Federal Enforcement  
21 is reported, and I don't think there is any question about that.

22 My first question had to do with page 22. Halfway down,  
23 "after reasonable notice upon presentation of a warrant" -- I  
24 have questions about that language, and Tom tells me that what  
25 that should be is, "after reasonable notice and upon presentation

1 of his credentials."

2 Seantor Boggs. "After reasonable notice and upon",  
3 instead of "or".

4 Senator Muskie. Yes.

5 Senator Boggs. Yes, I see.

6 Senator Muskie. So that whole subsection there is the  
7 right of entry to --

8 Senator Boggs. For investigative purpose, the Secretary's  
9 representative is given the right of entry with adequate notice  
10 of warrant, with presentation of credentials. Right. That he  
11 is a bona fide. That is what that means. Like the FBI shows  
12 you their ticket?

13 Senator Muskie. Right. And the Secretary will require  
14 a sampling of emissions, and so on.

15 Senator Boggs. Right.

16 Senator Muskie. And then 4(a), at the bottom is the court  
17 procedure to enforce these orders.

18 Then the questions I had on page 23 are these: These  
19 are minor ones, at the top: Or final decision. That is out.  
20 It is no longer relevant.

21 Senator Boggs. O. K.

22 Senator Muskie. And there is another one like that, down  
23 below, or final decision. There are some corrections in  
24 section numbers. This is 112 and 113, instead of 111 and 112.  
25 And down here, "Each court shall have jurisdiction to provide

1 such relief."

2 Senator Boggs. Yes. "Each court shall have jurisdiction  
3 to provide such relief as may be appropriate."

4 Senator Muskie. "Except that such court shall have juris-  
5 diction only with regard to the issue of relief being sought  
6 pursuant to this paragraph." That is to be stricken.

7 Senator Boggs. That whole sentence?

8 Mr. Jorling. The "except" clause.

9 Senator Boggs. Just the "except" clause. I've got you.

10 What do I have this part marked for? Up here, what  
11 precisely do we mean by "interferes with, hinders or delays  
12 the Secretary or his authorized representative from carrying  
13 out his responsibilities under this Act"?

14 Senator Muskie. Well, I suppose that would have to do  
15 with the right of entry, for example, or the right to sampling.

16 Mr. Jorling. Failure to furnish information required under  
17 the Act. , This kind of thing.

18 Senator Muskie. That is the next one. Refusing to furnish  
19 information.

20 What other examples?

21 Senator Boggs. When they legally object, you mean?

22 Senator Muskie. This is III, he is talking about. "Inter-  
23 feres with, hinders, or delays the Secretary from carrying out  
24 his responsibilities under this Act."

25 Mr. Jorling. I would suspect there would be many occasions

1 when the Secretary will ask for information in developing  
2 standards of performance, and emission standards, which should  
3 be obstructed, if a person just simply kept delaying the  
4 response to that.

5 Senator Boggs. Well, the first one says, "Violates  
6 or fails or refuses to comply with any standard or regulation."  
7 Or "interfered with, hinders, or delays the Secretary or his  
8 authorized representative from carrying out," and fourth,  
9 "refuses to furnish any information, data, report." It looks  
10 like those two spell out pretty much. And five, "Refuse to  
11 permit access" -- I was just wondering what we had in mind,  
12 if somebody asked us. I mean, dragging his feet?

13 Mr. Jorling. I think it is basically aimed to provide  
14 that the Secretary --

15 Senator Boggs. That is hard to prove, isn't it? Dragging  
16 his feet? I don't know.

17 Senator Muskie. That sounds like a catch-all clause.

18 Mr. Jorling. I think basically that is what it is.

19 Senator Muskie. "Hinders." I mean, "hinders."

20 Mr. Jorling. I think "hinders" could be stricken.

21 Senator Boggs. I have no big objection to it, because I  
22 am for the purpose of the section but, on the other hand, I  
23 think you ought to write something that you can define if  
24 somebody asks you what it means.

25 Senator Muskie. Well, the other, "interferes with or

1 delays." What other interference could there be besides the  
2 positive things that you have mentioned? It is a crime to  
3 violate -- it is a violation to refuse to comply with the  
4 standard of regulation, but what is there less than that that  
5 should constitute an illegal interference, or hindrance?

6 Senator Boggs. Refuse to permit access to and copying of  
7 It seems to me you have got it spelled out pretty good.

8 Mr. Jorling. I think it is basically redundant.

9 Senator Muskie. Yes. Why don't we strike that? That is  
10 sort of a mischievous thing. If there is anything else that  
11 occurs to you that you think ought to be specifically referred  
12 to, you think we ought to include it, but I worry about language  
13 like that.

14 Senator Boggs. Somebody can pick it out, and make such a  
15 big point of it, in trying to fight you on the substantive part.

16 Senator Muskie. Let's see. Now the final point I had on  
17 that page was near the bottom. "Except that the time limiting  
18 such orders, when issued without notice, shall be seven days."  
19 The time limit for what, for compliance with the order? Or with  
20 the effectiveness of the order, or what?

21 Mr. Jorling. From compliance with the court order. That  
22 is the purpose.

23 Senator Muskie. From the date of entry. What is meant  
24 by "the date of entry"?

25 Mr. Jorling. Entry of the restraining order.

1 Senator Muskie. Oh, yes. So that the restraining order  
2 shall take effect not later than seven days from the date of  
3 entry.

4 Can we say that in a more precise way? The time limit for  
5 compliance?

6 Mr. Jorling. Compliance.

7 Senator Muskie. That isn't it.

8 Senator Boggs. The date of entry?

9 Senator Muskie. When you say seven days from date of entry,  
10 are you talking about compliance or the effective date of the or  
11 order?

12 Mr. Jorling. I think the intention was to require com-  
13 pliance with the restraining order within seven days.

14 Senator Muskie. Why don't we say requirement of the  
15 compliance?

16 Senator Boggs. O. K.

17 Mr. Jorling. I am not sure that that section is relevant.  
18 Because there will be notice issued. No, I take that back.  
19 There will be some orders, that the courts will be asked to  
20 provide, under subparagraph now referring to these small  
21 Roman numerals, in the section. "Violates or fails to, refuse  
22 to comply with any standard, refuses to furnish information,  
23 refuses to permit access to," that may not have been the subject  
24 of an abatement order, cease and desist order, basically, issued  
25 by the Secretary, and in those instances, the court shall



1 provide seven days before compliance is required.

2 The other ones, the 72-hour provision is counseling how  
3 soon the court order would take effect, but the 7-day notice is  
4 for enforcement of these other violation provisions, "refuses  
5 to furnish information", "refuses to permit access to." Those  
6 that will be asked, the Secretary will ask the court to  
7 enforce, without having issued his own order to the alleged  
8 violator.

9 Seantor Muskie. So it is all right now.

10 Mr. Jorling. Yes.

11 Senator Muskie. On page 24 --

12 Senator Boggs. Mr. Chairman, just one question.

13 Suppose the court changes Rule 5 on us somewhere along the  
14 line.

15 Mr. Jorling. I might add that it should be Rule 65, but  
16 I would suspect that --

17 Senator Boggs. Can we write in the statute a certain rule,  
18 when the court changes them and amends them, and issues a new  
19 set of rules every now and then, with different numbers?

20 Mr. Jorling. The Federal Rules on Restraining order are  
21 issued by the court, and are relatively frequently modified. I  
22 think the emphasis is there just to follow the procedures that  
23 the court uses in its procedures for issuing temporary  
24 restraining orders.

25 Senator Boggs. Rather than spell out a specific rule

1 number.

2 Mr. Jorling. A new procedure for temporary restraining  
3 orders, and that.

4 Senator Muskie. Do we need to refer to the number of the  
5 rule? Or just "in accordance with the Federal Rules of Civil  
6 Procedure"?

7 Mr. Jorling. O. K. I think that is it.

8 Senator Muskie. So, on page 24, there are only two  
9 changes. Again, a section on this, about halfway down, it  
10 should be section 113, first, and the next one is section 112.

11 Senator Boggs. Is this a point? Harold Brayman points  
12 out that this is a point Senator Baker was making yesterday.

13 Senator Muskie. Oh, yes, that is right.

14 Mr. Jorling. Substantial evidence.

15 Senator Boggs. What is that now?

16 Mr. Billings. That should be made to conform with the  
17 evidence.

18 Mr. Jorling. There are several places we will have to do  
19 that.

20 Senator Muskie. You will do that wherever you have to.

21 Mr. Jorling. Yes.

22 Senator Muskie. All right, on that page, then?

23 Mr. Royce. Five years imprisonment? For one violation?

24 Mr. Billings. Second offense.

25 Mr. Jorling. It is a discretionary. Then it becomes

1 maximum.

2 Senator Boggs. The point, Mr. Chairman, that we were just  
3 discussing here is whether or not the 25,000 per day of viola-  
4 tion, which obviously could apply to a driver-owner of a car,  
5 if he is in violation --

6 Senator Muskie. This is "not more than".

7 Senator Boggs. "Not more than", right. And also, a final  
8 court decision of \$25,000 a day fine, and one year in jail, is  
9 it? "And/or"?

10 Senator Muskie. And not more than.

11 Senator Boggs. Not more than, yes.

12 Senator Muskie. You have got to cover a wide range of  
13 possible offenses, from violation by a motor driver to one  
14 by a great steel company.

15 Senator Boggs. In addition, let's see --

16 Senator Muskie. If you gear the penalty to the first,  
17 you are not reaching the second one at all.

18 Senator Boggs. What?

19 Mr. Royce. I didn't understand what you said, sir.

20 Senator Muskie. I said that these penalties can apply to  
21 the driver of an automobile, as Senator Boggs said, or it could  
22 apply to the United States Steel Corporation.

23 Senator Boggs. Right.

24 Mr. Royce. And five years imprisonment.

25 Senator Muskie. Not more than

1 Mr. Billings. For the second offense.

2 Senator Muskie. That is not minimal. It is maximum.

3 Second offense.

4 Senator Boggs. Oh, second offense, I see. Then there is  
5 a three-year period later on, page 31, for prohibiting Federal  
6 procurement, Federal dealing with the Federal Government. I  
7 just mention these. I don't know whether they are too steep  
8 or not.

9 Senator Muskie. Well, I have no judgment on them. We  
10 passed on them before. I mean, if you had no period at all,  
11 then it would be open-ended, and it could be more than one  
12 year and more than five years.

13 Mr. Meyer. Well, part of the panalty goes to State  
14 standards and plans to achieve greater air quality control, and  
15 this is --

16 Seantor Muskie. No, no. Those numbers have been changed.  
17 This is section 113 and section 112.

18 Mr. Meyer. As far as 113 is concerned, five years for  
19 knowing violation of hazardous substances, that's not bad.

20 Mr. Billings. Well, in your knowing violation he mentioned  
21 standards, it is a step beyond; you have had a court action, and  
22 then you have continued to go on violating.

23 Mr. Meyer. Am I correct, 113 and 112?

24 Mr. Royce. Then we are talking about new source standards  
25 of performance?

1 Mr. Billings. Emission plans, emission requirements,  
2 hazardous emissions and standards of performance.

3 Mr. Royce. Standards of performance.

4 Senator Muskie. That is new source standards, and the  
5 implementation. And the first violation is not more than one  
6 year. Is that too high?

7 Mr. Royce. No, sir, but it seems to me on new source  
8 standards, when we have put in available control technology  
9 as the operative language for new source standards, a second  
10 violation carrying a possible five-year imprisonment is a very  
11 strong penalty, when there may be some question about the  
12 meaning of "available control technology."

13 Senator Muskie. You are talking about it as though it  
14 were a mandatory five years. It isn't. It is up to.

15 Mr. Royce. Yes, sir, I realize it is up to, but we have  
16 quite a --

17 Senator Muskie. You are assuming we are going to have an  
18 arbitrary judge, who goes to the maximum.

19 Mr. Royce. It is possible.

20 Mr. Billings. What are the criminal penalties under the  
21 Sherman Act and the Clayton Act?

22 Tom?

23 Mr. Jorling. Yes, sir.

24 Mr. Billings. What are the criminal penalties under the  
25 Sherman Act and the Clayton Act?

1 Mr. Jorling. Well, I can't recall them, I just know that  
2 they can be extremely severe, and that a treble damage provi-  
3 sion is added on. I would have to check that.

4 Mr. Royce. Well, Mr. Chairman, I think in terms of  
5 penalty, there certainly is a difference in the Act between  
6 the knowing violation of hazardous materials or hazardous  
7 substances and a knowing violation in terms of new Standards of  
8 Performance. The new standards of performance doesn't deal with  
9 imminent and substantial danger of public health.

10 Mr. Billings. Well, it might.

11 Mr. Royce. Hazardous materials does.

12 Mr. Billings. It might.

13 Mr. Royce. In what instance might it? In which it  
14 wouldn't be covered under section 113?

15 Senator Muskie. You see, by standares of performance,  
16 what are we talking about?

17 Mr. Jorling. New source emissions.

18 Senator Muskie. New technology.

19 Mr. Royce. Are we talking about a steel mill or a gener-  
20 ating plant?

21 Senator Muskie. No, but I am talking about what the  
22 standard is.

23 Mr. Royce. Available control technology is the language.

24 Mr. Billings. It is somewhat broader than available con-  
25 trol technology.

1 Mr. Royce. Yes, but what else --

2 Mr. Billings. "Such standards shall be based on the  
3 latest control technology, processes, operating methods, and  
4 other alternatives for achieving the greatest degree of  
5 emission control which the Secretary determines to be attain-  
6 able."

7 Senator Muskie. Operating methods. That can be a con-  
8 tinuing problem.

9 Mr. Royce. And an arbitrary department, and more in  
10 advance, or more advance information on control technology,  
11 than a particular operator, you might say this is his second  
12 knowing violation.

13 Mr. Jorling. I think the issue of fines would be a matter  
14 in which the court would take separate pleadings, basically,  
15 and this is maximum. It does not require the court to issue  
16 any fine.

17 Mr. Royce. That point has been made several times, Tom.  
18 I am aware it is a maximum. But it also allows for a five-year  
19 imprisonment.

20 Mr. Jorling. That is right.

21 Mr. Royce. And judges are not infallible.

22 Senator Boggs. Or both.

23 Mr. Jorling. I do not deny that.

24 Senator Muskie. Deny what?

25 Mr. Jorling. I do not deny that judges are not infallible.

1 They could impose a fine like that, or an imprisonment, where  
2 there is not sufficient cause, but I do think there can be  
3 circumstances of continued violation of either a court order  
4 or a secretarial order, where the court might want to impose  
5 such a requirement. I do think the principles of equity  
6 would apply.

7 Mr. Royce. And \$50,000 a day is some incentive to get  
8 right with it. Five-year imprisonment for emission of nitrous  
9 oxides, perhaps, above the standard.

10 Senator Muskie. Why don't we reduce that to two?

11 Mr. Royce. Sir?

12 Senator Muskie. Reduce it to two.

13 Mr. Royce. All right, sir. That is better than five.

14 Mr. Billings. Shall we reaise the fine?

15 Senator Muskie. We have doubled the 25 to 50 already.

16 Mr Royce. You think there are no other changes we might  
17 have in this bill?

18 Senator Muskie. I'didn't focus on that, either.

19 Mr. Royce. Well, it is customary, and certainly counsel  
20 can clarify this, graduate the fine in the same ratio that we  
21 graduate the imprsonment, isnt' it?

22 Senator Muskie. All right.

23 Mr. Jorling. There probably would be a pattern like that  
24 to emerge, if anybody made an analysis.

25 Mr. Royce. I think that was the issue that we faced on



1 this capital security bill at one time in this committee.

2 Senator Boggs. Just one other question.

3 Leon, any person who knowingly violates any plan, any  
4 plan, for implementation or emission requirements, included in  
5 such plan, or who knowingly -- the rest of it gets specific --  
6 "who knowingly violates any prohibition or emission standard  
7 established under" -- But any person who knowingly violates any  
8 plan for implementation or emission requirements - - this is  
9 the plan that various regions or the State of Delaware and the  
10 State of Maryland, the State of Pennsylvania are coming up  
11 with for implementation, is it not? And the plan is going to  
12 be, we hope, somewhat similar in Pennsylvania and Delaware,  
13 but not necessarily identical.

14 Just sitting here reading it, I am not making a big point,  
15 but I don't know -- "violates any plan." That is a pretty  
16 broad statement. The rest of it is specific.

17 Mr. Billings. The difficulty of proving a knowing viola-  
18 tion of the plan, I think is partial protection there.

19 Senator Boggs. I agree with you.

20 Mr. Billings. What we are trying to get at, and maybe the  
21 words of art should be used, trying to get at knowing violation  
22 of compliance schedules, because between the period of time in  
23 which an emission requirement is agreed upon, there will be a  
24 compliance schedule period. By not doing anything, a source  
25 of pollution could greatly delay the investment of money, and

1 so on. This could be taken to meet the emission requirement at  
2 some later date, and so it is a compliance schedule that is  
3 really key to any enforcement during the plan for implementation  
4 period. That is what the staff was trying to get at here. If  
5 the preference is to go to the terms, then --

6 Senator Muskie. If these plans -- they might be emission  
7 standards for automobile, I suppose.

8 Mr. Billings. Under section (h) I believe it is, that can  
9 get at the individual. I suspect that is the only one that  
10 really can get at the individual. The emission requirement  
11 section. Compliance schedule is the key word.

12 Mr. Royce. This could conceivably --

13 Senator Muskie. That phrase applies to new sources as  
14 well as to compliance schedules?

15 Mr. Billings. Well, compliance schedule in this sense  
16 would be only a part of the plan for implementation. New  
17 sources are handled in hazardous sources, would be taken care  
18 of by this.

19 Senator Muskie. Would that do the trick? Are you recom-  
20 mending a compliance schedule?

21 Mr. Billings. I think it would do the trick.

22 Senator Muskie. Tom?

23 Mr. Jorling. I think so.

24 Senator Muskie. Why don't we substitute the phrase  
25 "compliance schedule"?

1 Senator Boggs. It would be more specific.

2 Senator Muskie. For any plan of implementation. Is that  
3 it?

4 Senator Boggs. "Any person who knowingly violates compliance  
5 schedule for implementation or emission requirements."

6 That is what you really mean.

7 Mr. Billings. If enacted, I think we could use the words  
8 in (b), Schedule of Compliance, compliance to refer back to  
9 that part of the language for interpretation.

10 Senator Boggs. This would pin it down.

11 Mr. Royce. And this would refer, then, only to stationary  
12 sources?

13 Senator Muskie. I guess so. Unless there is a compliance  
14 schedule for automobiles, adopted by some region.

15 Senator Boggs. That would clear up another point, wouldn't  
16 it?

17 Mr. Royce. This could conceivably bring in the automobile,  
18 under the \$25,000 penalty.

19 Senator Muskie. Well, if the community buys that sort of  
20 thing, that kind of a program for their automobiles, it would  
21 be only because, dammit, they think it is serious. I think it  
22 would be easy to sell that kind of a program in New York  
23 today. Too bad this legislation isn't on the Floor today.

24 Mr. Billings. It has been suggested by a few people that  
25 it should be.

1 Mr. Royce. I wonder about the enforceability of it  
2 against an individual auto operator, though.

3 Senator Muskie. Well, I am sure that it would -- I can't  
4 envision anybody imposing a \$25,000 fine per day on an auto-  
5 mobile owner. I mean, that is the outside limit. You have  
6 got to assume that there will be some judges who will impose,  
7 you know, dollar fines, or ten-dollar fines.

8 Mr. Royce. You might catch Mr. Onassis.

9 Senator Muskie. All right, does that cover it?

10 Page 25. I have just one change there on page 25. In  
11 subsection 5(A), I wanted to be sure that we are talking about  
12 employees of alleged violators, and did you have any changes?

13 Senator Boggs. Is this language worded to encourage  
14 frivolous employee suits as a method to insure against firing?  
15 Should there be a penalty against an employee, if he seeks  
16 to act frivolously against the employer?

17 Senator Muskie. That doesn't seem to me an employee is  
18 likely to do that.

19 Mr. Billings. He is certainly not going to be frivolous  
20 about that.

21 Senator Muskie. It doesn't seem to me, because you are  
22 talking about a potential closing down of a plant. Is an  
23 employee frivolously going to initiate an action that will close  
24 down his plant?

25 Mr. Brayman. I don't know what will happen in this sort of

1 instance, but if an employee for one reason or another suspects,  
2 that he might be fired, or if he is not, for one reason or  
3 another, very good at his job, he could, under this language,  
4 see an opportunity to complain that they are using illegal  
5 practices and polluting the atmosphere.

6 Through this entire process, the company, I think, would  
7 be reluctant to take any action against that employee, for fear  
8 that they would then come under all the other proceedings of  
9 discharging him for reasons, for bringing this testimony or  
10 suit. And I don't know. It would seem to me if the language  
11 is open to encouraging that sort of complaint.

12 Senator Boggs. Any employee now of any employer can  
13 enter into some kind of an agreement with a competitor -- and  
14 they do it every day; I have had them as witnesses, when I  
15 tried suits -- trying to run down the competitor, and for pay,  
16 and all that business. You run into that risk all the time.  
17 This may just make it a little easier.

18 Senator Muskie. I think if we put in a frivolous suit,  
19 the penalty against the employee, you would just in effect  
20 cancel out the effect of 5(A).

21 Senator Boggs. O. K.

22 Senator Muskie. All right. 26. I have no questions here,  
23 although let's look at (c), 26 down at the bottom.

24 "Whenever an order is issued under this paragraph, at the  
25 request of the applicant, a sum equal to the aggregate amount

1 of all costs and expenss (including the attorney's fees) as  
2 determined by the Secretary of Labor to have been reasonably  
3 incurred by the applicant for, or in connection with, the  
4 institution and prosecution of such proceedings, shall be  
5 assessed costs and expenses.'

6 Is that a phrase of art?

7 Mr. Brayman. Costs and expenses.

8 Senator Muskie. Is this cort costs?

9 Mr. Jorling. No, it would include court costs, but go  
10 beyond that, and witness fees, and that kind of thing. That's  
11 why the word "expenses" generally is there.

12 Senator Boggs. It doesn't include going out to lunch  
13 and two martinis for lunch, does it?

14 Mr. Jorling. I don't believe so. Expenses directly  
15 related to litigating.

16 Senator Muskie. Page 27. I have no questions here. There  
17 is an insertion somebody has written in. Section 115 (a), the  
18 third line, instead of "violation, "failure to achieve."  
19 Failure to achieve what?

20 Mr. Billings. In an air quality region national  
21 ambient air quality standards. The thing we are trying to  
22 establish here is where it turns out that an approved plan  
23 does not implement the national air quality standard, this is  
24 probably because of miscalculation of all concerned. It is not  
25 a violation, per se; it is a failure of the plan to achieve it,

1 and we are trying to set up a circumstance which will cause  
2 reorganization of the plans.

3 Senator Muskie. I think that is all right. Any objection,  
4 Caleb?

5 Senator Boggs. No.

6 Mr. Billings. There is an outstanding question I think  
7 Senator Boggs has, which is a valid one.

8 Senator Boggs. Yes, let me take just a minute. If the  
9 Secretary finds that air quality standards can't be met because  
10 the plan he approved is inadequate, he has 30 days to call a  
11 conference to revise the plan, and within another 30 days the  
12 conference is to make recommendations on ways to revise the  
13 plan to achieve the air quality standard within the period of  
14 time established by the Act for implementation of such  
15 standards. Then there would be a 90-day period, for public  
16 hearings and promulgation of modifications.

17 Language in the above quotation, as well as subsection (c),  
18 at the top of page 28, would indicate that revisions would have  
19 to meet the four-year deadline discussed for implementation  
20 plans, assuming that the Secretary may not find out about the  
21 inadequacies of an implementation plan until the date when the  
22 standard must be met. This would indicate that there is in  
23 fact no time at all given to the polluter to procure and  
24 install a new device to further control its pollution. Maybe  
25 there should be language in the bill giving the Secretary some

latitude, due to the fact that he approved the implementation plan as adequate, and the polluters went ahead in good faith to meet the original plan.

Senator Muskie. I see.

In other words, the problem is, if the plan is inadequate, how should that be taken into account, in the timetable for meeting the national standards?

A possible way you can do it is to give the Secretary discretion to extend the timetable, I suppose.

Mr. Billings. Or you could tie it into whatever we come up relative to the petition to the court to relieve a State from the statutory deadline, because of inability to meet that. Require the Secretary to join with the Government in the petition, whenever he finds his plan was inadequate. It ought to be pretty much a fait accompli.

Senator Boggs. Where would you put the word?

Mr. Billings. I think we would just have to add a clause after the (d), which ties it back to the other one, which we haven't gotten to.

Senator Muskie. Well, I think you have got to put a sentence in. In the event such findings are made at a point where there is inadequate time left to meet the national deadline, that appropriate relief in the form of extending the deadline should be provided.

Why don't you just make that note, and then we will have



1 to see how to work it out when we handle the other problem.

2 Mr. Guard. Mr. Chairman, would you also want to make this  
3 applicable not only to where he sees on the basis of studies  
4 that there will be a failure to achieve, but that after the  
5 fact, that there has been a failure to achieve an air quality  
6 standard?

7 Senator Muskie. I suppose what you need -- Yes, that is  
8 right, because you might very well have a finding that although  
9 the plan has been fully implemented, and the deadline has come  
10 and gone, that the standard hasn't been achieved, and so a new  
11 program is going to have to be launched.

12 Mr. Guard. At which time he needs some discretion to set  
13 another deadline. It may well happen, and then after the  
14 deadline has run, you get in there with monitoring equipment  
15 and find out --

16 Senator Muskie. What more needs to be done.

17 Mr. Guard. --you need a new plan.

18 Senator Muskie. Yes, we need to develop a paragraph to  
19 cover both of those situations, I think.

20 Mr. Grundy. There may also be the case where the  
21 individual plan did not reflect an industry that was a new  
22 industry in the area, which went in after the plan was developed.

23 Mr. Jorling. I think that could not be used as an excuse  
24 for not meeting the ambient quality standards, because we have  
25

1 got it covered in the implementation. They are required to  
2 warrant that basically no new facility will interfere with the  
3 attaining of the standard.

4 Mr. Grundy. A new industry which they may not anticipate  
5 will go into the place.

6 Mr. Jorling. They can't have one they don't anticipate.

7 Mr. Grundy. But it may require controls on the existing  
8 facilities in the original plan.

9 Mr. Guard. That is not going to be a matter that would  
10 be pleaded for failure to obtain.

11 Mr. Jorling. That is presumably covered in the develop-  
12 ment of the implementation plan. Including the sources of such  
13 air pollution, operated in such a way that such sources will  
14 not interfere with the implementation, maintenance enforcement  
15 of any applicable air quality standard. So that that is  
16 accounted for in their implementation plan, and if they fail  
17 to exercise that authority, then it is a failure of the State.  
18 The State can't come in and say, "Well, this guy came in. They  
19 should have regulated that guy when he came in, if they could  
20 not achieve it then." ~

21 Mr. Royce. Mr. Chairman, may we focus on that point a bit?  
22 The introduction of a new industry in an area by your remarks,  
23 Don and Tom, would indicate that the bill would require all  
24 of the burden on that new industry for implementing the ambient  
25 air quality standards, though that industry, in another situation,

1 might emit sufficiently so that everybody in the areas would  
2 have to lower their emissions.

3 Mr. Jorling. I think the burden is on the State to decide  
4 how it wants to treat this situation. It could say, "We can't  
5 accommodate you in this region, and maintain our air quality,  
6 and therefore, we are not going to permit you to enter." Or  
7 it could have the flexibility to negotiate with other emitters,  
8 existing emitters, and say, "We would like to get this new  
9 industry in. If we can revise your emission requirement, we  
10 can bring it in." But the burden is on the State to  
11 accommodate the new industry, or to exclude.

12 Mr. Royce. You are talking about what time period?  
13 Seventeen months, something like that? Let's say at one stage,  
14 after the State has submitted its plan, and a major new industry  
15 is invited or decides to locate there, and they have maybe ten  
16 months from that date to implement the plan, what options  
17 do they have?

18 Mr. Jorling. I think it would be as follows: If a State  
19 in a particular region desires to build in a factor of new  
20 growth, it will devise its implementation plan for existing  
21 sources so that it will have some left, some emissions left,  
22 for new industries to come in, during the course of developing  
23 of the implementation, or during the period to achieve the air  
24 quality standard, or to achieve the level of that standard.  
25 If they did not build in that margin of growth, into their

1 implementation plan, they would then either only allow clean  
2 industries to relocate into that region, or they would simply  
3 have to preclude the development in that. This is the dif-  
4 ficult choice that is being forced upon these communities, and  
5 there is no denying that that is exactly what it is.

6 Senator Muskie. Well, in the first place, the standard is  
7 at the health effects level. Let's not forget that.

8 Mr. Jorling. Yes.

9 Senator Muskie. So that, you know, if you are talking  
10 about a city where the health effects level is barely met by the  
11 plan, you should not build in any growth factor anyway. You  
12 shouldn't allow any emissions to be added.

13 Now if it is up to the regions', it is up to the States'  
14 discretion as to how much more, the health effects level a  
15 standard is going to be provided for in the implementation  
16 plan, and that is why they have the discretion to provide the  
17 growth factor.

18 Mr. Royce. Then it would seem to me as we look at  
19 projections of growth in the country, then, most of the  
20 implementation plans would, in order to accommodate industrial  
21 growth, have to be put out at more stringent levels than the  
22 national ambient air standards to protect public health.

23 Mr. Billings. If they are going to have growth, that is  
24 true.

25 Mr. Royce. If they are going to have growth.

1 Mr. Billings. Most major metropolitan areas, any area  
2 over 150,000, 200,000 would have to do so. A moving source you  
3 are talking about is something else.

4 Mr. Royce. Talking about stationary sources, and we  
5 are talking about regions that you ultimately will cover the  
6 whole country.

7 Senator Muskie. Well, for regions that are now, you  
8 know, permitting pollution above the health effects level,  
9 dammit, what do they do about economic growth?

10 Senator Randolph. What were you going to say, Dick?

11 Mr. Grundy. I was going to say if another industry is  
12 added, it is going to require revision of the plan, and if we  
13 are going to be consistent with the purpose of the Act, it  
14 should require re-evaluation by the Secretary.

15 Mr. Jorling. That is not the way it works, though. It  
16 just doesn't come in under the implementation plan. It has to  
17 be cleared to come in, by the implementation plan, so that it  
18 will enable achievement of the air quality standard reference to  
19 health within the period set by the statute. There is, now,  
20 basically a mandatory permit system; a State can't permit an  
21 industry to come in and have air emissions that will not enable  
22 achievement of the health effects air standard.

23 Mr. Grundy. I am saying the original plan would not  
24 reflect this industry, and would require revision of the plan  
25 and revision of the emission requirements on the individual

1 sources. It may, and if it does, then the Secretary should  
2 be put in a position of having to review --

3 Mr. Billings. If you create that kind of circumstance,  
4 however, you would be in exactly the same situation you were  
5 with every single zoning plan you have got in the United States  
6 today, and that is that every time somebody wants to change  
7 an area, a locked-in single-unit dwelling to commercial, they  
8 go into a big fight, so therefore, you have no national  
9 ambient air quality standard. IYou just don't achieve it.

10 I think that the plans are going to have to provide for  
11 a margin. They are going to have to make a decision as to  
12 whether they can have that margin, whether they can achieve a  
13 national ambient air quality standard in a set time period and  
14 also have room for new industry. There are areas of the country  
15 that will not have room for new industry. New York City, for  
16 example, probably cannot absorb any new industry for the next  
17 five years.

18 Mr. Meyer. The State form that has been set with the  
19 requirement in the plan that there be permits and land use  
20 procedures established; obviously, they are going to have to  
21 figure out where it will go.

22 Mr. Jorling. This isn't that far advanced. Colorado is  
23 one, Fairfax County is another, which has reached this point,  
24 they have said, "We can't tolerate that industry, and we are  
25 excluding them, because of air quality and water quality."

1 So it is just a reflection of the existing situation.

2 Mr. Guard. Mr. Chairman, as I recall the criteria docu-  
3 ment nos suggests in setting up these standards that they have  
4 latitude for the council, and that they set a standard which  
5 will accommodate their planned growth.

6 Mr. Billings. The margins of safety there are for the  
7 failure of the data to indicate the full range of effects  
8 on the bill.

9 Senator Muskie. Well, as I understand what we are saying,  
10 we are setting the health effects standard, and anything that  
11 doesn't cross that line is within the discretion of the region,  
12 which means the State. If you cross that line, then you run  
13 afoul of the national law. If you don't cross that line, you  
14 are all right.

15 Now that is where the region examiner sizes its authority.  
16 But I don't think we want to give it authority to cross that  
17 line, do you?

18 Senator Boggs. I don't think we do, and in the second  
19 place, I don't think anybody would want to start a business if  
20 it was harmful to health.

21 Mr. Jorling. I think this ties in, more than indirectly,  
22 with the idea that we have to have distribution of population.  
23 This is going to assist in that kind of a movement, instead  
24 of having further concentration in large cities; this is  
25 going to provide for population, distribution, and in that sense

1 be consistent with, I think, a developing national policy.

2 Senator Muskie. Well, we have discussed it. Does any-  
3 body want to raise the issue now? This section 115(A),

4 This section 115 (a), do we leave it stand at that?

5 Mr. Billings. With the revision relative to the extension.

6 Senator Muskie. Failure to achieve.

7 Senator Boggs. With additional clarification paragraph.

8 Senator Muskie. Yes, that is right.

9 Mr. Guard. To provide for those that will be or have been,  
10 a failure to achieve, in either case. That will trigger this  
11 mechanism.

12 Mr. Meyer. Senator Muskie, may I raise one minor issue?  
13 Reading: Section 115 and 114, subparagraph 2, it says, "When-  
14 ever, on the basis of surveys, studies, investigations or  
15 reports, the Secretary" --

16 Senator Muskie. Where are we?

17 Mr. Meyer. Reading on Section 115 and again on the applic-  
18 able language on 114, the same language, I think a question  
19 raised on that is, should we make it clear in here that the  
20 Secretary is to respond to a complaint from a citizen or group  
21 of citizens who want to have him make an investigation or an  
22 allegation either of these sections should be brought into play?

23 Because as it is now, it conceivably could be interpreted  
24 only the Secretary or his employees can originate such actions.

25 Senator Muskie. I think that is a good suggestion. What do



1 you think?

2 Senator Boggs. Yes.

3 Mr. Jorling. My only suggestion would be maybe hold off  
4 how to handle it until we consider the next section.

5 Mr. Meyer. No, I don't think this has got anything to do  
6 with citizen suits. I think it is a question of saying on  
7 his own motion or on the complaint of somebody else, he can  
8 do these things. I don't think it is a pattern of having the  
9 court, the citizens suit action involved in this thing. It  
10 may be that some citizen is aware under the implementation  
11 plan that a decision is necessary, but the officials who are  
12 responsible for, you know, getting it started, aren't aware of  
13 that yet.

14 Senator Boggs. What does "or reports" mean? Is that a  
15 report? Who from, the citizens' group?

16 Mr. Meyer. It could be an official report that is  
17 being prepared.

18 Senator Boggs. It could be an official report, or it  
19 could be a report from a group of citizens.

20 Mr. Meyer. Right. I think we ought to make it clear,  
21 though, that citizens can ask the Secretary to do this sort of  
22 thing.

23 Senator Boggs. Local reports, now, news and gossip in the  
24 community? Is that what is meant, Leon?

25 Mr. Billings. That is right.

1 Mr. Jorling. Or reports, including requests.

2 Senator Muskie. You ought to be careful, not just to  
3 leave an open invitation, to trigger, without any discretion  
4 on the part of the Secretary.

5 Mr. Billings. The Secretary has to find on the basis  
6 of that complaint.

7 Senator Muskie. No, but the question is whether any  
8 citizen may force him to go through the process of making a  
9 finding.

10 Mr. Meyer. All I would suggest is that right after the  
11 "whenever", say, "Whenever either on the Secretary's motion,  
12 or on the complaint of a citizen and on the basis of surveys,  
13 studies, investigations or reports, the Secretary".

14 It wouldn't be a matter of requiring the Secretary to do  
15 it, it would just be a matter of giving them access to ask  
16 him to do it.

17 Senator Muskie. We could find the right phrasing. The  
18 way you phrased it there, it could be interpreted by a citizen  
19 to mean that dammit, if he complains, the Secretary has got  
20 a duty to, you know, unleash the personnel to investigate his  
21 complaint, however baseless, and make a formal finding.

22 Mr. Meyer. The only problem I have is on the other side,  
23 the Secretary's people might say, "Well, we didn't find it,  
24 and therefore, we don't want to be bothered with it" kind of  
25 thing too. So the Interstate Commerce Act does have language

1 like that, and I will dig it out.

2 Senator Muskie. Let's find it. There is no objection to  
3 the concept. The Secretary ought not to be insensitive to  
4 citizens' complaints.

5 Now, 28. I don't know. The bottom of the page, citizen  
6 suits.

7 Senator Boggs. The District Courts of the United States.

8 Senator Cooper. Can I say something about the language  
9 there? On 115(a).

10 Senator Muskie. Oh, back there?

11 Senator Cooper. "The Secretary or an authorized representa-  
12 tive finds that in any air quality region an improved implemen-  
13 tation will be "inadequate to achieve national ambient air  
14 quality standards."

15 Maybe my version seems a little --

16 Senator Muskie. I think that sounds like better language,  
17 John.

18 Senator Cooper. In other words, the Secretary or an  
19 authorized representative finds that in any air quality region,  
20 an approved implementation will be inadequate to achieve the  
21 national ambient air quality standards, he shall notify the  
22 Secretary.

23 Senator Muskie. I like that language, yes. Have you  
24 got that?

25 Mr. Guard. Or again, has been, after the fact. They go

1 in there and find out that the air is polluted, and they have  
2 not violated one of two things, they have either violated  
3 emission requirements, or the implementation plan, based on the  
4 diffusion models, isn't adequate.

5 Another reason for this, which I might just mention, is  
6 if we go ahead as fast as we are talking about on criteria,  
7 they are not going to have a year to monitor and find out what  
8 they have in these areas, and they are going to have to proceed  
9 on the basis of diffusion models and computer programs for  
10 those models, so it could happen rather easily that the  
11 implementation plan isn't achieving that standard.

12 Senator Boggs. That is good. Yes.

13 Senator Muskie. All right. We are on page 28.

14 Any questions, down to citizen suits?

15 Senator Boggs. Senator Baker raised a question on this,  
16 didn't he, Leon?

17 Senator, as I understand, his objection is to the United  
18 States Court of Appeals for the District of Columbia.

19 Mr. Billings. Only on the citizen suits question. Are  
20 you talking about citizen suits now?

21 Senator Boggs. Citizen suits, right, section 116(b).

22 Mr. Billings. Can the staff indicate a change in  
23 section (a), before we continue? All members will have it.

24 On the 8th line down on page 29, which starts out, "Is  
25 an alleged violation of", delete the words "applicable air

1 quality standards."

2 This is for consistency, and then the staff recommends  
3 substituting there "Alleged violation of any schedules and  
4 timetables of compliance," which are a part of an approved  
5 implementation plan, so we will have the same language we had  
6 in the section on knowing violations.

7 Senator Muskie. Any objection to that?

8 Now what is Baker's question?

9 Senator Cooper. All to be centered in the District of  
10 Columbia, or to be tried in others?

11 Senaor Boggs. I understand Senator Baker has objection  
12 to placing the burden entirely on the District Court of Appeals.  
13 This section prevents the court from delaying any implementation  
14 plan or admission requirement, unless he determines that the  
15 petition is one likely to win, and two, that the interests of  
16 the public will not be handled by such a stay.

17 Senator Cooper. You can probably object to the whole  
18 jurisdiction of the District of Columbia.

19 Senator Boggs. I think that is it.

20 Mr. Jorling. There are two grants of jurisdiction here  
21 proposed. One is a grant of jurisdiction to the district courts  
22 to hear charges of violation.

23 Senator Boggs. The United States Court of Appeals for the  
24 District.

25 Mr. Jorling. Not in subsection (a).

1 Senator Boggs. Right.

2 Mr. Jorling. It is district courts.

3 Senator Muskie. Subsection (a) deals with violations.  
4 Subsection (b) deals with the review of promulgated standards.  
5 One is violations; the other is the appeals addressed to  
6 standards, implementation plans, emission requirements, the  
7 standards of performance.

8 Mr. Billings. Perhaps it would be well first for Tom to  
9 explain the purpose of subsection (b), because it may be  
10 slightly out of place. It probably should be subsection (c).

11 Go ahead and explain it.

12 Senator Cooper. Before you start on it, may I just  
13 perhaps discuss this? I understand (b), that any group of  
14 citizens can have a right to question the standards, the  
15 regulations. But I want to know more about (a).

16 I want to know if there is any precedent here, whether  
17 it is a good thing or not, to have a multiplicity of suits  
18 involved: any person, to clutter the courts, all the time,  
19 claiming that this industry or this state or this region is  
20 violating this Act, in every case, to make a party out of  
21 the Secretary, or at the beginning of this, anyway, why don't  
22 we leave it to the Secretary to bring these suits, instead of  
23 giving a cause of action to every Tom, Dick, and Harry? They  
24 have got Causes of action under common law, and under State law  
25 Senator Boggs. To bring them on behalf of the citizens

1 in a bona fide case.

2 Senator Cooper. Yes, on their own behalf, if the viola-  
3 tion damages them.

4 Senator Boggs. Yes.

5 Senator Cooper. Don't open up a lot of worms until you  
6 have some experience.

7 Senator Muskie. Well, John, this is one of the most  
8 divisible issues in this bill.

9 Senator Cooper. What?

10 Senator Muskie. This isn't the olly committee that is  
11 considering the class suite idea. The Commerce Committee has  
12 it. The Judiciary Committee has it. And this form of partici-  
13 patory democracy is being pressed all over the country, and we  
14 had pretty good testimony on it. It has strong support, and I  
15 think that there ought to be an opportunity for citizens, not  
16 on a frivolous basis, but on a responsible basis, to question  
17 the adequacies of performance or standards in their regions,  
18 for a couple of reasons.

19 First, because of the obvious one, that I think citizens  
20 increasingly feel they ought to have this kind of access.

21 Secondly, it might have the effect of achieving better  
22 compliance, in effect, strengthening the enforcement resources  
23 of the various levels of government, if polluters understand  
24 that it is subject not only to official enforcement action, but  
25 oversight by responsible citizens' groups.

1 Now the difficulty, of course, is to define the right.  
2 I feel very strongly that it would be a healthy thing to  
3 include this kind of a provision in here, if we can define it.

4 Senator Cooper. Well, I just stated what came to my  
5 mind. I can see if a body of regulations have been issued,  
6 and a group of citizens considers it not adequate, they should  
7 have without question, the right to go into court.

8 The other right, I can see your point in that. But I  
9 really believe at the beginning of this, in this field, you  
10 have got to give it a chance for a while. Probably leave it  
11 to the authority of the Secretary for the time, to push those  
12 which were of absolute importance. I can see a lot of harass-  
13 ment.

14 Senator Muskie. Well, this is a costly business, John, and  
15 one of the safeguards that are written in here -- it may not be  
16 adequate -- is on page 30, and that is the right to recover  
17 costs of litigation.

18 Senator Cooper. Where is that?

19 Senator Muskie. You see, "such cost shall be recovered  
20 only if the court determines that the action was in the public  
21 interest, as an extension of the public policy to protect  
22 and enhance the quality of air."

23 Senator Boggs. In other words, they have to win the suit.

24 Senator Muskie. No, not necessarily. You might lose a  
25 close one and still have served the public interest.



1 Senator Boggs. Yes.

2 Senator Cooper. Good faith, and therefore reasonable  
3 grounds, some grounds.

4 Senator Muskie. You might write, put some good faith  
5 phrase in there of some kind.

6 Senator Cooper. Well, I will withhold. I have a reservation on it.  
7

8 Senator Muskie. Oh, it is a proper question, because that  
9 question has been raised in the hearings, and --

10 Senator Spong. I think it has been raised in private  
11 previous executive sessions, or previous executive meetings.

12 I recall expressing some concern about administrative  
13 remedies being exhausted.

14 Now Senator Baker, in the Commerce Committee, has introduced for discussion, and it was adopted, with regard to  
15 class actions, a period of time -- not very lengthy, 90 days --  
16 during which either the Department of Justice or the Federal  
17 Trade Commission would have to move in the case of, you know,  
18 certain complaints. But they would be given a period of  
19 time during which that would happen before the suit could be  
20 actually brought.  
21

22 Now I am not sure that our aim for this situation is  
23 exactly the same as consumer protection, but it is the same  
24 principle, and I don't know. Has Howard expressed himself on  
25 this, to any of you?

1       Seantor Boggs. Not to me he hasn't.

2       Senator Muskie. We had a preliminary discussion of this  
3 some weeks ago now.

4       Let me ask the staff. We had one concept, it seems to  
5 me, I remember vaguely we discussed, was whether or not the  
6 group of citizens ought first to explore the possibility of  
7 triggering official enforcement, official action.

8       Senator Boggs. I remember that discussion.

9       Senator Muskie. Before they go to court.

10      Senator Boggs. Right.

11      Senator Spong. Well, I remember bringing this up, and  
12 talking about the administrative remedies, and we got off the  
13 track a little bit because Senator Baker was concerned that we  
14 may be taking something away from the Federal court. Do you  
15 remember that?

16      Senator Muskie. That is right.

17      Senator Spong. And let me say that --

18      Senator Muskie. Well, there is this sentence in here that  
19 relates to that. The last sentence in subsection (a):

20      "Nothing in this subsection shall affect the rights of  
21 such persons as a class or as individuals under any other law  
22 to seek enforcement of such standards."

23      That certainly was part of the earlier discussion.

24      Senator Spong. That is right.

25      Senator Muskie. But what Senator Cooper is raising is the

1 question of whether or not you or what safeguards we ought to  
2 write in, to prevent frivolous multiplicity of actions.

3 Senator Spong. I share that concern.

4 Mr. Royce. The staff is not of one view on that, Mr.  
5 Chairman .

6 Senator Cooper. What?

7 Mr. Billings. The staff is not of one view.

8 Mr. Jorling. Mr. Chairman.

9 Mr. Royce. Counsel and I are very much concerned about  
10 the prospect, especially in the present climate, of loading  
11 the courts with irresponsible allegations, and as a civil  
12 libertarian, I do have some concern about the people who are  
13 languishing in jail because of crowded court dockets, and  
14 what this might do to further overload the courts, unless there  
15 is some safeguard that administrative remedies have been  
16 exhausted.

17 Senator Muskie. This is one of the key provisions of the  
18 bill, in terms of public interest, press interest, so we do have  
19 to handle it carefully and responsibly.

20 Leon wanted to say something.

21 Mr. Billings. Are you through, Dick?

22 Mr. Royce. Yes, go ahead.

23 Mr. Billings. As far as the administrative remedies test,  
24 and we have had considerable discussion, as Dick indicates, we  
25 are not of one mind, but first, in drafting this language,

1 staff, these of us who drafted language, are very careful to  
2 design the test for and action to a violation of a standard,  
3 rather than as to Commerce Committee, the Hart-McGovern Bill  
4 suggests a test of pollution, which is not defined.

5 Mr. Jorling. Unreasonable pollution.

6 Mr. Billings. So taht it would be a relatively objective  
7 test, against which a court would make a judgment, either a  
8 violation of a time schedule, or an emission requirement, or  
9 standard of performance, or emission standard, taking place.

10 This is relatively proveable, if anhting is proveable,  
11 under the law.

12 Secondly, as far as air pollution -- this may not be the  
13 case when we get to water pollution, bur as far as air pollu-  
14 tion is concerned, I suspect that nearly a hundred percent,  
15 99 percent of the information on which such suits would be  
16 based would be developed from public monitoring, or from  
17 information provided by the polluter. It is very unlikely that  
18 citizens are going to get on stacks of polluters and be able to  
19 carry out the tests which would determine whether or not  
20 emission requirements or emission standard was being violated.  
21 You can imagine circumstance of somebody flying over a stack  
22 with a helicopter, but I think this is highly unlikely, so you  
23 would have data which generally, under the statute, would have  
24 been made available by the statute to the agencies charged with  
25 the obligation of enforcing the statute. The fact that the

1 information was there, and it had not been acted on by the  
2 agencies, would seem to indicate that administrative remedies  
3 weren't being used, and thus citizens should have a right of a  
4 action in the courts.

5 Mr. Royce. Well, what is that alleged violation?  
6 Alleged by whom?

7 Mr. Billings. A citizen.

8 Mr. Royce. Well, then, it wouldn't require all of the  
9 data that you indicated in order for them to bring it to court.

10 Senator Muskie. No, no, they could bring it for a  
11 frivolous reason, but what Leon is saying, as I understand it,  
12 is that of course any citizen can bring an entirely baseless  
13 suit, you know, for violation of common law rights, as far  
14 as that goes. There isn't a hell of a lot of frivolous activity  
15 of that kind done, because lawyers are expensive, courts are  
16 expensive, and so there aren't many frivolous suits brought.  
17 What Leon is saying is that the fact that the information upon  
18 which a suit can be proven is restricted to an official finding,  
19 monitoring is going to tend to limit bringing of frivolous  
20 suits, because the citizen, you know, doesn't have the informa-  
21 tion.

22 How many citizens really want to go into a suit, go to a  
23 lawyer and bring a suit, without some kind of data to support  
24 his case? The data has got to be official, unless citizens  
25 set up their own private monitoring basis or systems.

1 It would seem to me that would be a very real safeguard.  
2 I don't know. I have not heard this argument made, but I  
3 think it is a very substantial one.

4 Senator Cooper. If I may ask another question: For some  
5 of these remedies, as declaratory, equitable relief, or any  
6 other appropriate order against any person, what would be  
7 embraced in equitable relief?

8 Mr. Billings. I defer to counsel on that.

9 Senator Spong. What did you say, Leon?

10 Mr. Billings. I defer to counsel on that.

11 Senator Spong. An injunction.

12 Senator Muskie. Specific performance?

13 Senator Cooper. I know that would be included.

14 Senator Muskie. Specific performance.

15 Senator Cooper. Specific performance, but this will --  
16 any personal rights you may have, as a person, for damages.

17 Mr. Jorling. The intention in the language, as I under-  
18 stand it, is to specifically avoid any damage provisions. It  
19 is strictly an equitable provision to abate, to halt, to  
20 prevent this violation from occurring, and does not address  
21 itself to either physical or monetary damages in any way. It  
22 is strictly an action to achieve the abatement, if found, of a  
23 violation of the schedule of compliance and emission stand or  
24 emission requirement.

25 It does not go to the issue of damages at all, and that

1 comes out, I think, of the whole philosophy of the Act, and  
2 that is, it is very difficult for anybody to prove personal or  
3 monetary damage resulting from the effects of air pollution.

4 Mr. Billings. We have reserved the rights of citizens  
5 under other common law to seek damages for pollution, if such  
6 damages occur.

7 Mr. Meyer. Your last sentence goes to the refuse act.  
8 As long as we are talking, I have very difficult problems with  
9 this part. It was the reason I raised the issue before, on  
10 section 114 and section 115. I think that what has been happen-  
11 ing as far as class actions and the great propensity for  
12 certain lawyers to go around and collect clients to take  
13 on popular issues is, I think, a serious consideration that has  
14 got to be looked at, but more importantly than that, I don't  
15 quite buy the simplicity with which Leon talks about the data,  
16 being taken from the agency, because it is a question of how  
17 you interpret that data, once you pick up the raw information,  
18 and I think that we may be in some cases saddling the district  
19 courts with decisions on facts which they are not sufficiently  
20 expert to be able to render a reasonable decision, and the  
21 court is going to start fishing around for reference to an  
22 agency anyhow, and it would seem to me, if we start to stream  
23 off by giving the right, by maybe changing it a little bit,  
24 and giving the right to citizens to go to the agencies, State  
25 or Federal agencies, to seek this relief, and that upon failure

1 to take it to court, we would be, I think, cutting down on a  
2 number of frivolous actions, but more importantly, on legitimate  
3 actions I think we would be giving them the right kind of  
4 agency and buttressing the court when it finally does have to  
5 order specific action by a violator.

6 Senator Muskie. Well, we considered this proposal once  
7 before. I forget how we resolved it. The question of seeking  
8 administrative relief first.

9 Mr. Billings. The question that was raised that wasn't  
10 really resolved was the fact that under the provisions for  
11 Secretarial action, there is a 72-hour time period, against  
12 which a polluter has to correct his violation. If you  
13 establish a lengthy administrative delay, you don't have --  
14 you have not provided the citizen with an opportunity to get  
15 at the polluter. Seventy-two hours, if he has to have a  
16 continuous proof of violation, you know, the polluters can  
17 start up and stop pretty quickly, to avoid this kind of an  
18 action, and so if you have a lengthy delay, this has long been  
19 the criticism of the Water Quality Acts and the Air Pollution  
20 Act, that you had six months between the time you find a  
21 violation and the time that you go to correct it, and you have  
22 got to prove that that thing is going on, when you finally go  
23 to court, 180 days later.

24 Senator Muskie. Well, that is the citizen's problem. If  
25 the Secretary has acted, you know, and he has got the 72 hours



operating, then the citizen doesn't give a damn about bringing the suit.

Mr. Billings. That is right.

Senator Muskie. It is when the Secretary hasn't acted that, presumably, the citizen's group may be interested in bringing action. They would be delighted to have the 72 hours running.

I don't see why that should be a limitation upon bringing, upon going to the Secretary for administrative relief.

Mr. Billings. Theoretically, the Secretary has had this information, because this information --

Senator Muskie. No, but he hasn't acted. So the 72 hours isn't running.

Mr. Billings. That is right.

Senator Muskie. So what the hell is the group of citizens losing by going to him and asking him to start the 72 hours running?

Mr. Billings. All right, and how long does he take?

Senator Muskie. Well, I mean however long he takes is less time than he is losing by not invoking the 72 hours.

Mr. Billings. But the citizens might be gaining by not having to go through it.

Mr. Royce. Seventy-two hours?

Senator Muskie. Well, granted, it is another step in the administrative process. The question is whether it is necessary

1 in order to reduce the possibility of multiplicity of suits  
2 and frivolous suits. I don't know whether it is too much. The  
3 Secretary, of course -- you get also the problem of besieging  
4 the Secretary with frivolous actions, and citizens might be  
5 more inclined to start administrative proceedings frivolously  
6 than court proceedings.

7 Because if you go to the Secretary, you know you don't  
8 have court costs, you don't necessarily have to have a lawyer.  
9 You could just besiege him with more informal, frivolous  
10 appeals to the Secretary, whereas when you are going to a  
11 court, it is a more formal proceeding; so you might tend to  
12 multiply actions by injecting an administrative remedy. I  
13 don't know.

14 Mr. Royce. Well, Mr. Chairman, if I might make the  
15 observation that from a lawyer's point of view, it is not  
16 frivolous, some of the bills that are now being considered,  
17 one consumer protection bill which would, one case under it,  
18 ten million citizens, ten dollars apiece damages, and the  
19 lawyer gets ten percent of the damages. Now a million dollars  
20 is some incentive for a lawyer to bring suit. And we might have  
21 a number of such suits that --

22 Senator Muskie. There are no damages here.

23 Mr. Royce. No, sir, but we have a parallel, I think.

24 Mr. Meyer. I think as between tying up with this kind of  
25 problem, assuming the large number of frivolous actions, between

1 bying up the enforcement staff of an agency which is supposedly  
2 expert in this field, and tying up a District Court in the  
3 United States which has a lot of cases other than these kinds  
4 of cases, and has already got a backlog, I think that the  
5 public is better served by having the agency flick off the  
6 frivolous suits and make its judgment on them, because once  
7 those people are turned down by the agency, if they feel  
8 strongly enough about it, they may go to court anyhow, but I  
9 think the question is that at least then, as far as both the  
10 defendant and the court are concerned, there is an agency  
11 record that has some validity to it.

12 The agency has done something, and if the agency refuses  
13 to act, then the citizen has got a right to take the agency  
14 to court.

15 Senator Muskie, Yes, but if you pose a frivolous purpose  
16 to start with, I mean, the guy who is frivolous in invoking the  
17 Secretary's attention, I think he might be disposed, even if he  
18 loses there, to invoke the court's, too. So you would have  
19 bogged down both levels.

20 Mr. Meyer. I think we would have benefited those who have  
21 legitimate grievances.

22 Senator Muskie. We are not talking about -- Now you are  
23 talking about --

24 Mr. Meyer. We have the problem of frivolous cases under  
25 any circumstance. And I think that --

1 Senator Boggs. They are not going to get far.

2 Mr. Billings. With or without this law.

3 Mr. Meyer. Yes, with or without it, we have got it.

4 Mr. Royce. But the point, Mr. Chairman, is the agency  
5 with the staff is better able to screen the valid cases than  
6 a District Judge with two clerks.

7 Senator Muskie. Yes, but you see the class suit isn't  
8 injected here to provide relief for the valid case, of  
9 which the Secretary or some other enforcement agency recog-  
10 nizes. The class route is injected here for use when there  
11 has been a failure of the administrative agencies, the  
12 administrative enforcement agencies, to do their duty.

13 Senator Spong. All right.

14 Now may I interrupt you there, and have Leon demonstrate  
15 that to me? Where the failure is, how much time there is  
16 before somebody can go right to the Federal Court? Because  
17 that is what I want to know, and I would like to know where  
18 the State enforcement agency is all this time, too.

19 Now will you just tell me? Suppose that we have got a  
20 violator, and the village lawyer has got 35 irate citizens, and  
21 they want to do something about it. Now what do they have to do  
22 in terms of the Secretary, or the State enforcement agency,  
23 before they can go under this law to the District Court?

24 Mr. Billings. As I read it, Senator, they don't have to do  
25 anything.

1 Senator Spong. That is the way I read it, but I wanted  
2 you to tell me that.

3 Senator Muskie. Should they have to?

4 Mr. Jorling. The requirement here would be that the  
5 citizen would allege that there is, in effect, one of these  
6 categories of regulation, the schedule of compliance, by an  
7 emission requirement for a standard of performance, and they  
8 would have the burden of showing the prima facie violation of  
9 that.

10 Senator Spong. But the main thing we want to accomplish  
11 is to stop the pollution.

12 Senator Muskie. That is right.

13 Senator Spong. And the people who are charged with that  
14 are either a State agency or the Federal Government, and what  
15 you are doing, you are letting some lawyer, through allegations,  
16 be the judge of the gravity of the situation, without giving any  
17 administrative agency an opportunity to tell these people to  
18 cease and desist.

19 And I am for class actions, Ed. I think they are needed.  
20 I think citizen participation is needed. I think there is a  
21 great danger that you are going to turn this over to a bunch of  
22 nuts running for political office, who want to make a big name  
23 by suing everybody they can, and getting in the paper.

24 Senator Muskie. I resent being called a nut (laughter).

25 Senator Spong. What did you say?

1 Senator Cooper. Last week when we had the highway bill  
2 up, I heard one man from the District of Columbia, we had a  
3 monologue for over an hour.

4 Mr. Royce. And there are thousands like him, Senator  
5 Cooper, and turn him loose with this law --

6 Senator Cooper. Thinking about the practicality of the  
7 thing, this is going to be a big job to get all this going  
8 and working, and it just seems to me for a time at least you  
9 ought to give the Federal and local authorities a chance to make  
10 this system work, without being -- if they spend all their time  
11 in court. They would have to be parties.

12 Mr. Meyer. I think in a number of instances I think what  
13 would happen is once the suit was filed, and it got into court  
14 before the judge either at a pretrial hearing or at the trial,  
15 one of the first questions the judge is going to ask the  
16 plaintiffs is "Have you been to the regulatory agency?" And  
17 if they say "No", he is going to say, "Why don't you go down  
18 there and come back when you have finished with that." Because  
19 they do that.

20 Senator Muskie. Well, let me ask you this: Suppose that  
21 you write in a provision -- and we have gone through this once  
22 before. I forget just how we resolved it -- but if we were  
23 to write in a provision that they must go to the administrative  
24 agency if it is State, Federal, or what-have-you, I mean under  
25 what conditions do they then go to the courts? Is there going

1 to be a time limit within which the administrative agencies  
2 must do something? Must they hold a formal hearing on the  
3 citizen's complaint? What must they do in a formal way that  
4 gives the citizen a visible claim to then seek the judicial  
5 relief which we would provide?

6 Mr. Meyer. Have you got --

7 Senator Spong. Now my recall of our earlier discussion  
8 was that we went around and around, just like we are doing now,  
9 and you ended up by saying that you thought notice, you see, as  
10 opposed to a hearing, and I am inclined to agree with this.

11 Senator Muskie. That notice should be given?

12 Senator Spong. Some notice should be given, and there  
13 should be a time. Now I recognize that we are dealing with  
14 probably a narrower time factor, lesser one, than in the case  
15 of consumer things, but there ought to be a time, so that you  
16 really don't have a useless State enforcement agency, that  
17 just sits up there, and they have never really given every  
18 opportunity to act, because it is wrong if you have a continuing  
19 violation, and they won't do anything. A citizen should be able  
20 to go into court and do something. But if this is a one-shot  
21 proposition, and the first thing the State agency or the Secre-  
22 tary knows about it is that Joe Blow has filed a suit with 50  
23 citizens, I think that is wrong, too, frankly.

24 Senator Muskie. Well, I recall that we went that far.

25 Senator Spong. We ought to have notice.

1 Senator Muskie. But it seems to me that we agreed to go  
2 beyond that. I mean, suppose that we set up a provision that  
3 the citizens may bring suit, but when they do, they must file  
4 the notice of it with the administrative agencies. Now this  
5 comes up in court. The judge says, "Well, now, what happened?  
6 What action is the administrative agency taking?" Obviously,  
7 the court is then going to be concerned with some standard of  
8 performance by the agency before he will consider what action  
9 he ought to take, with respect to the citizen's suit, so you  
10 have got to have some standard of response by the agency to  
11 the notice.

12 Senator Spong. It is coming back to me now. Senator  
13 Baker's concern was that we could be taking a right away from a  
14 citizen -- it wasn't the court -- that he already has in some  
15 instances, not in all of them, spelled out here, to go into  
16 court anyway, you see, but I know this isn't very helpful to  
17 you, Ed, and I know that time is of the essence, but I think ---

18 Senator Muskie. Oh, no, no. I think this has got to be  
19 written carefully.

20 Senator Spong. I have reservations about this, the way  
21 it is, and I hate to just say that without giving you a better  
22 alternative, but I really believe we have got to bring, to give  
23 the State and the Secretary some opportunity.

24 Senator Muskie. Well, let's pursue it this way. Suppose  
25 that, in the enforcement arm, under the implementation plan, or



1 the Secretary, and I suppose that it ought to go to whoever is  
2 enforcing or charged with enforcing the implementation plan,  
3 or the emission standard, in the case of new sources. Whoever  
4 has responsibility for that, and I guess we would have to  
5 phrase it that way, gets notice.

6 Now what would we want that agency to do, in response to  
7 that action by citizens? What do we think they ought to do,  
8 forgetting now what the courts might do? What should we ask  
9 them to do, regarding, considering the demands on manpower  
10 and everything else, what should they be required to do?  
11 Shouldn't it spell that out?

12 Mr. Royce. Could we not ask them to make a finding  
13 within, say, 30 days? Is that too much?

14 Mr. Billings. Finding? Wouldn't that require an  
15 administrative hearing?

16 Mr. Jorling. I don't think it would be necessary.

17 Mr. Royce. A finding would either support the citizens,  
18 or not.

19 Mr. Meyer. Not necessarily.

20 Mr. Jorling. You could phrase it, if after notice, the  
21 agencies would have some time, a period of time in which to  
22 initiate an action, under their authority, or to issue a state-  
23 ment of why they didn't.

24 Senator Muskie. In the first place, the action, the  
25 initial responsibility rests at the State level, as we are

1 writing this law, doesn't it?

2 Senator Spong. Does it?

3 Senator Muskie. Yes. The implementation plan, you see.  
4 In the case of the emission standards for new sources, the  
5 Secretary has direct enforcement authority. Right?

6 Senator Spong. Let me look at it.

7 Mr. Billings. Under both sections 112 and 113, the  
8 Secretary has direct authority.

9 Senator Muskie. Direct authority, with respect to the  
10 stationary sources, that is, existing stationary sources. The  
11 implementation plans of the States must provide for the  
12 enforcement authority. If the States don't provide it, then  
13 the Secretary has direct authority. But assuming that the  
14 States will, and they will, provide their own enforcement  
15 authority, then you are going to have maybe 50 State statutes  
16 with varying enforcement procedures, to enforce the provisions  
17 of the plan, including the emissions requirements, and ambient  
18 air quality standards. So if you go to the States, and  
19 require the citizen to go to the States, in those cases, then  
20 the time periods may vary, depending upon what the State  
21 statutes are. The enforcement procedures available under the  
22 State statutes are going to vary, so what do we then, sitting  
23 here, set down as a requirement or standard that the citizen  
24 must meet with respect to his 50 variations before he is free  
25 to pursue a judicial remedy?

1 Senator Spong. Well, I don't think that the citizen has  
2 to be made to look toward a finding.

3 Senator Muskie. By a State agency?

4 Senator Spong. By a State. I do think that the citizen  
5 before he is entitled to a hearing in the court, or really  
6 even to file a suit, should give some type of notice to the  
7 State and Federal agencies that are concerned, and give them  
8 some opportunity to issue whatever order they may be empowered  
9 to do administratively, or to bring a suit themselves. What  
10 I am saying is, if we pass a law which bypasses these  
11 enforcement agencies, you are never going to find anybody  
12 doing anything but rushing right into the Federal Court.

13 Senator Muskie. Well, the question I am raising, Bill, is  
14 that if it is just a notice requirement, you know, the guy with  
15 the frivolous purpose isn't going to be inhibited from purchasing  
16 his judicial remedy simply because he has been required to file  
17 a notice.

18 Senator Spong. I think it is a notice, a notice and a  
19 time thing.

20 Senator Muskie. A time frame for what to happen?

21 Senator Spong. Giving them time within which to  
22 initiate something themselves, whether it be administrative or  
23 whether it be legal.

24 Senator Muskie. All right.

25 Senator Spong. Not make a finding themselves.

1 Senator Muskie. All right, then what evidence initially  
2 on the part of the State enforcement agency should be suf-  
3 ficient? Well, let's put it this way: First of all, there  
4 could be the simple taking of an initiative by State agencies.  
5 Well, they might take an initiative, and then let it just drop  
6 there. What then happens to the citizen's right to pursue his  
7 judicial remedy?

8 Or, two, the court, the State agency may take an initiative,  
9 and actually make a finding that there is no violation, and  
10 that doesn't satisfy the citizen. Should he then have a right  
11 to pursue his remedy?

12 Senator Spong. Yes, I don't think he should be precluded  
13 from any adverse finding at all. I just --

14 Senator Muskie. Well, let me pursue it one step further.

15 Senator Cooper. May I get in there? I have to go in  
16 a few minutes. It seems to me if you get that point, you said  
17 on what basis you get the citizen to proceed then, I think that  
18 there should be some finding, some record by the enforcing  
19 agent, if he is State in some cases, or it would be Federal  
20 Secretary in some cases, but there would be something upon which  
21 the citizen could proceed, then.

22 Senator Muskie. So that what you are saying, John, is that  
23 if we require that the citizens go some other route and directly  
24 to the courts, that other route would take him as far as  
25 administrative initiative, and administrative finding, then

1 conceivably a court action, brought by that administrative  
2 agency to implement its own order, and a finding by the court  
3 on that administrative initiative. I mean, it could go that  
4 far before the citizen then brings his own court action, or  
5 should he be precluded from doing so, if a court has acted  
6 upon an administrative initiative?

7 And should then the citizen be entitled to go and proceed  
8 to get his own court finding, on an issue that has already  
9 gone the court route, by way of an administrative initiative?  
10 Or should you limit the citizen's suit to the point of an  
11 administrative finding which is not pursued in the courts?

12 I mean, if the administrative agency goes to the courts,  
13 in other words, goes as far as it can to settle the grievance  
14 raised by the citizen, should that court finding then  
15 conclude a citizen's suit, ab initio?

16 Senator Spong. Well, I don't think so.

17 Senator Cooper. You don't?

18 Senator Spong. No.

19 Senator Cooper. It would seem to me that once it gets to  
20 the administrative agency, if the administrative agency takes  
21 the action the citizen has and actually takes it to the court,  
22 the court has made a decision upon it; if he doesn't take it,  
23 the Secretary does nothing, or makes a finding that doesn't  
24 suit the citizen, I think the citizen ought to have a right to  
25 go into the courts.

1 Senator Spong. That is what I am saying.

2 Senator Muskie. May I suggest to the staff that we put  
3 together language which would condition the right to bring a  
4 suit directly into court upon the finding of the complaint and  
5 the administrative agency. If that results in a court finding  
6 of the issues, then no citizen's suit would lie. If it does  
7 not, in other words, if the administrative initiative halts,  
8 stops at some point short of a court finding, then the citizen  
9 can pursue his judicial remedy under the Act. Let's see  
10 just how it looks, just see what it looks like.

11 Mr. Royce. Mr. Chairman, as a possible finding by the  
12 administrative agency, that agency has the authority to  
13 initiate action outside of court just administratively.

14 Senator Muskie. Well, if they issue an order to abate,  
15 yes, I am talking about an administrative finding that there  
16 is no grievance which isn't pursued in courts.

17 Mr. Royce. Well, then, the citizen should have a right to  
18 go to court.

19 Senator Muskie. That is what I am saying. And that  
20 finding becomes a predicate upon which the judge can make some  
21 meaningful decision when the citizen comes to court.

22 Senator Muskie. All right, let's put it together that way,  
23 and see what it looks like.

24 Senator Cooper. You have to look also at what substance and  
25 strength that finding has, because you have got other sections

1 in there which declare that the finding -- Well, anyway, this  
2 decision, all the facts, is conclusive.

3 Mr. Billings. ONE further question, Mr. Chairman. If  
4 the suit procedure is followed, the citizen complains to the  
5 administrative agency, which could be an item as costly as the  
6 actual going directly to court, yet with the administrative  
7 remedy, he has no opportunity to recover his costs, if he is  
8 right. Let's assume that the administrative agency issues an  
9 order to abate the pollution that the citizen has found, and  
10 in the process, the citizen has spent 10,000 bucks. He has  
11 solved his problem, but he has no access to recover his costs.

12 Senator Muskic. Well, I mean, the citizen doesn't have to  
13 take that formal an action to the attention of an administrative  
14 agency. That group of citizens.

15 Mr. Royce. That is not expensive.

16 Senator Muskic. Write a letter, and give notice, and  
17 then the administrative agency has a responsibility, then. If  
18 the administrative agency refuses to take an initiative, or if  
19 the administrative agency is taking an initiative and issued an  
20 order to abate, in those cases, then no citizen class suit would  
21 lie, presumably. If the Administrative agency refuses to take  
22 initiative, then a class suit would lie, because they would then  
23 try the administrative group.

24 Senator Spong. Did he understand my answer to you? That  
25 is what I said. I don't think Senator Cooper followed that. Or

1 else I misunderstood him.

2 Senator Muskie. Well, let's go over it again.

3 First we are going to require notice, and this is  
4 informal. This isn't any damn court action. Notice to  
5 administrative agency of the grievance. If the administrative  
6 agency rejects it, and they must respond, we can put that  
7 requirement in here, that they must either acknowledge and  
8 investigate and, you know, pursue their own procedures --

9 Senator Spong. Within what period of time?

10 Senator Muskie. Within a certain period of time. And I  
11 would think that the initiative could be within, you know, 30  
12 days, it would require more time for actually pursuing it to  
13 point of an order, and the taking of the initiative, acknow-  
14 ledging the grievance, and a decision to proceed, that ought to  
15 be done within 30 days. And then you would need a longer time,  
16 if they take it, before that administrative remedy has been  
17 pursued.

18 I don't know how long. It depends upon what we have got  
19 in here for that. You have already written in timetables.

20 Mr. Royce. We have abatement provision.

21 Senator Muskie. In the sections we have looked at this a  
22 afternoon, haven't we? The issuance of an order? So then, if  
23 there is positive action by the agency, that ends it. If  
24 there isn't, if they refuse to take the initiative or acknow-  
25 ledge the grievance or if they proceed with their procedures,



1 and decide that no order lies, in other words, that there is  
2 no basis for the grievance, then in those cases the class suit  
3 is in order.

4 Senator Pong. Proceed at their own peril.

5 Senator Muskie. Yes.

6 Mr. Billings. What about the violation of emission  
7 standards which is a hazardous substance?

8 Mr. Meyer. The agency ought to have a summary operation  
9 on that itself, since it is going to be responsible for that  
10 enforcement, too.

11 Mr. Billings. I realize that, but this is something which

12 Senator Muskie. Well, there is a procedure for the adminis-  
13 trative agency to follow there. I think we have just set it up,  
14 haven't we?

15 Mr. Billings. Yes, there is a procedure for the adminis-  
16 trative agency to follow, but the point is that if a citizen  
17 alleges a violation on the basis of publicly available data,  
18 a violation of emission standards, i.e., an emission of toxic  
19 substance, should there be a 30-day delay in which to acknowledge  
20 and investigate the complaint?

21 Senator Muskie. I know, but you are ignoring the effect  
22 of the public pressure. The group of citizens will go, in a  
23 way to trigger court action, and that is clearly what they are  
24 going to be doing, because we would have written the law, saying  
25 now that is a hazardous substance here that you are ignoring,

1 Dammit, Leon, I can't imagine that the agency is just going to  
2 frivolously dismiss it, and if they do, then it is just going  
3 to take time to get them into court. You can't give a group of  
4 citizens the summary power to haul an administrative agency,  
5 you know, on to the execution block, in a situation of this  
6 kind, I don't think.

7 Mr. Meyer. There may be two categories of citizens'  
8 actions that are uncovered by this language, but I think one  
9 is the citizen should have a right to go to court, when there  
10 has been a failure, to enforce, and that is the allegation, if  
11 they are making the allegation against an agency directly  
12 a failure to enforce.

13 Senator Muskie. The alleged violator.

14 Mr. Meyer. Right. The other one might be that where the  
15 agency has issued a cease and desist order, but is busy  
16 chasing after something else, that the citizen can go in to  
17 enforce in a cease and desist order which has been issued by  
18 the administrative agency.

19 Mr. Billings. What about a new stationary source that is  
20 operating without a certificate?

21 Mr. Meyer. You know, I think all these things can be  
22 opened up to them. Once you set up this base, this key in  
23 with the administrative agency, you can either make them the  
24 enemy or the hero, depending on how they want to play it, but  
25 I think the citizen, if the citizen has the right to sue a

1 violator, a private violator, a citizen should have a right to  
2 sue a public violator, i.e., an agency which isn't doing its  
3 job.

4 Mr. Billings. Are you suggesting that if there is a  
5 violator, if there is a stationary source operating without a  
6 certificate --

7 Mr. Meyer. Which is required by law, the citizen knows  
8 this, one would assume that the agency would know this; this  
9 says you go after the agency or the violator. It's the easiest  
10 thing in the world to go after both of them.

11 Senator Muskie. Well, if you are going to go after the  
12 agency, I am sure a court will say you have got to first prove  
13 you have given notice.

14 Mr. Meyer. Right.

15 Mr. Billings. I am not asking that; I am just asking  
16 whether he means the suit should be after the violator.

17 Mr. Meyer. You join them. All that means is that instead of  
18 of handing one piece of paper, it says we plan on handing out  
19 two.

20 Mr. Billings. In that case, this 230 days would not be  
21 applicable.

22 Mr. Meyer. I think we have got some work to do and  
23 come back to the committee with how these things can be handled.

24 Mr. Billings. Because you are really talking about in the  
25 case of a guy that is operating without a certificate, a

1 criminal violation as set up in the previous section, with a  
2 criminal penalty.

3 Mr. Royce. The non-certificate and the hazardous substance  
4 probably have a different time in which for the agency to act  
5 on implementation.

6 Mr. Billings. Especially since you are filing injunctions  
7 as to hazardous substances.

8 Senator Muskie. All right.

9 Well, I don't know. There are going to be other dif-  
10 ficulties that occur to you as you try to put this together,  
11 and we can't anticipate them all or answer them all now, but  
12 this obviously is the sense of the committee, that we ought  
13 to try this and try to work it out, so let's see if we can do  
14 it.

15 Senator Spong. Thank you.

16 Seantor Muskie. Let's see if we can dispose of -- Oh,  
17 I have a meeting at 3:30. Well, we accomplished more than we  
18 did yesterday.

19 What else have we got left, beyond what was on the agenda  
20 today?

21 Mr. Billings. Federal procurement is the only language  
22 left that is of any importance.

23 Senator Muskie. Then we come back to the key question of  
24 timetable for national ambient air standards.

25 Mr. Royce. And look at Title II, moving sources, or fuel

1 additives.

2 (Whereupon, at 3:32 p.m. the committee was recessed  
3 subject to call.)  
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